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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1424

DAVID EMERY SERFASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

QUESTION PRESENTED

Whether the United States may appeal from an order, entered prior to the empanelling of a jury, dismissing a criminal prosecution on the basis of the court's examination of records and affidavits setting forth the evidence to be adduced at trial, where the dismissal is alleged to be based on an erroneous interpretation of the applicable law.

STATEMENT

The facts of this case, which are not in dispute, are set out in the opinion of the court of appeals (App., *in-*

fra, pp. 14–16). In brief, petitioner was indicted by a grand jury sitting in the United States District Court for the Middle District of Pennsylvania. The indictment charged petitioner with failing to report for induction, in violation of 50 U.S.C. App. 462(a). Prior to trial, petitioner moved to dismiss the indictment on the ground that the order to report for induction was not issued validly. The district court granted this motion, relying on petitioner's selective service file, his affidavit in support of his motion and other material going to the validity of the order.

The United States filed a notice of appeal pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, as amended by the Omnibus Crime Control Act of 1970 (84 Stat. 1890). The Act provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
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> * * * * *
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> The provisions of this section shall be liberally construed to effectuate its purposes.

The court of appeals unanimously rejected petitioner's claim that it was without jurisdiction to hear the appeal and reversed the order of the district court on the merits. Speaking to the issue of appealability, the only issue raised by the petition for certiorari, the court of appeals found that cases construing the old Criminal Appeals Act to preclude an appeal in the circumstances here were inapposite. It held that

"[t]he 1971 amendment to § 3731 * * * was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible" (App. infra, p. 18). Accordingly, it concluded that "[c]ases decided under the prior version of § 3731 are of little aid in determining appealability under the present version" (*ibid.*).

Moreover, relying on its earlier opinion in *United States* v. *Pecora*, 484 F. 2d 1289 (C.A. 3), the court of appeals also held that an appeal was not barred by the Double Jeopardy Clause. In the *Pecora* case, the court of appeals, discussing the appealability of a pretrial dismissal, held that "absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn" (*ibid*). Although *Pecora* involved a pretrial dismissal based upon a stipulated statement of facts "raising a legal issue," the court of appeals found that there was no meaningful distinction between the facts here and those in *Pecora* (App. *infra*, pp. 19–20):

> Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding as in *Pecora*, that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled

the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order.

DISCUSSION

Petitioner claims that the order of the district court was not appealable and that the court of appeals erred in entertaining jurisdiction over the appeal.[1] He alleges that the construction of Section 3731, "as applied by the Third Circuit Court of Appeals in this case, has put the defendant, your petitioner, in jeopardy in violation of the clear import of the statute itself and the United States Constitution" (Pet. 5).[2] To the extent that petitioner's claim is based on the intent of Congress in amending the old Criminal Appeals Act, his argument is inconsistent with the language and legislative history of the present Act and has been rejected expressly or implicitly by every court of appeals that has decided the issue. On the other hand, there is a conflict among the courts of appeals over the issue whether the Double Jeopardy Clause bars an appeal from a pretrial order dismissing an indictment on the merits. Since resolution of this conflict is important to the administration of the federal criminal justice system, we believe the petition for certiorari should be granted.

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[1] The petition is confined to the issue of appealability. Petitioner does not here contend that the district court's dismissal of the prosecution was legally correct.

[2] The page reference is to the typewritten copy of the petition for a writ of certiorari. References to the opinion of the court of appeals are to the Appendix to this memorandum, reproduced *infra* for the convenience of the Court.

A. THE LEGISLATIVE HISTORY OF THE CRIMINAL APPEALS ACT

In arguing that Section 3731 does not authorize an appeal in the circumstances of this case, petitioner relies erroneously on cases construing the old Criminal Appeals Act (18 U.S.C. (1964 ed.) 3731), which Congress expressly intended to overrule. Prior to the 1971 amendments, Section 3731 authorized an appeal to the court of appeals from "a decision or judgment setting aside, or dismissing any indictment * * * except where a direct appeal to the Supreme Court of the United States is provided by this section." This provision was generally construed as authorizing appeals to the court of appeals *only* from orders dismissing indictments which rested on a defect in the indictment or institution of the prosecution. The legislative history of former Section 3731, which was said to reflect a policy against permitting appeals in criminal cases by the United States, was cited as justification for ignoring what was acknowledged to be the plain language of the old Criminal Appeals Act. See, *e.g.*, *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9); *United States* v. *DiStefano*, 464 F. 2d 845, 847 (C.A. 2). Accordingly, it was held that an appeal did not lie to the court of appeals from pretrial orders dismissing indictments, when the district court had determined on the basis of stipulated or undisputed facts that there was a valid defense to the indictment, and also when the dismissal was for failure to prosecute or was predicated on the failure of the United States to comply with a discovery order. *United States* v. *Apex Distributing Co.*,

supra, 270 F. 2d at 751; *United States* v. *DiStefano*, *supra*, 464 F. 2d at 848; *United States* v. *Ponto*, 454 F. 2d 647 (C.A. 7 *en banc*); *United States* v. *Findley*, 439 F. 2d 970 (C.A. 1).

Since many of these orders could not be appealed directly to this Court under the provisions of former Section 3731 (cf. *United States* v. *Brewster*, 408 U.S. 501, 504–507), and since often, when such an appeal was possible, the issue was not of sufficient importance to justify review by this Court, Congress determined to amend Section 3731 to "assure that the United States may appeal [to the court of appeals] from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits." S. Rep. No. 91–1296, "Amendments to the Criminal Appeals Act" 91st Cong., 2d Sess., pp. 2–3.[3]

Congress took particular notice of the manner in which the old Criminal Appeals Act had been construed (*id.* at 5):

> Although the literal language of the present statute appears to authorize an appeal to a court of appeals whenever an indictment or information is dismissed, " * * * except where a direct appeal to the Supreme Court * * * is

[3] The amendments to the Criminal Appeals Act, which were enacted as part of Omnibus Crime Control Act of 1970, 84 Stat. 1890, were drafted by the Senate Judiciary Committee. They were adopted without change by the Senate, and were modified only by a clarifying amendment added in the conference committee (H. Conf. Rep. No. 91–1768, 91st Cong., 2d Sess., p. 21). The "well considered and carefully prepared" Senate Judiciary Committee Report is, therefore, particularly relevant in construing Section 3731. *Schwegmann Brothers* v. *Calvert Distillers*, 341 U.S. 384, 395–396 (Jackson, J., concurring).

> provided * * * ," the statute has not been so interpreted. * * *
>
> * * * [T]he Criminal Appeals Act, as interpreted today, does not provide for an appeal by the United States to any court in a large variety of cases where the dismissal is based on grounds having nothing to do with any defect in the indictment, or the construction or invalidity of the underlying statute. For example, if a court issues an order for discovery, believed to be unauthorized, a court will dismiss the indictment if the prosecutor refuses to comply. There is at present no way the prosecution can test the validity of that dismissal and the underlying order. If a court dismisses an indictment for lack of timely prosecution under the Federal Rules, without finding a denial of the constitutional right to a speedy trial, the Government has no right to appeal. * * * Also, the statute, passed at a time when the range of Federal prosecutions was considerably narrower, fails to take into account the current necessity of reviewing administrative records in connection with a criminal prosecution—an outgrowth of the tremendous expansion of administrative agencies, particularly the establishment of the Selective Service System, since 1907. This has given rise to situations which do not readily fit into categories of pleadings recognized at the time the act was first passed.

Moreover, Congress indicated specifically its desire to provide for appeal in cases such as this (*id.* at 14):

> The problems of appealability have recently become especially serious in selective service cases where judges have reviewed defendants'

> selective service files before trials and dismissed the indictments after finding that there have been errors by the draft boards. *These are issues to be determined by a judge, not a jury, and there is no reason why they should not be subject to appellate review.* The question of whether actions such as those resulting in selective service case dismissals are appealable to courts of appeals, if appealable at all, is currently being litigated. If it should be decided that such appeals lie only to the Supreme Court, this will make it difficult for the Government to take appeals in a large number of selective service cases which ought to be reviewed, because such decisions often turn on special, narrow facts and thus are not sufficiently important to warrant an appeal to the Supreme Court. [Emphasis added.]

The Criminal Appeals Act, as amended, plainly carries out the expressed intention of Congress. Section 3731 now provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Act contains no exception for appeals from dismissals on the merits that rest not upon the sufficiency of the indictment alone, but upon extraneous facts. In order to avoid just such a narrow reading of the new Act, similar to the interpretation that had been imposed upon the old Act by judicial gloss, Congress specifically directed in the new statute that

"[t]he provisions of this section shall be liberally construed to effectuate its purpose."[4]

In light of this background, every court of appeals which has construed the amended Section 3731 has concluded that an appeal by the United States will lie in all cases where the Double Jeopardy Clause permits it. *United States* v *Jenkins,* C.A. 2, No. 73–1572, decided December 11, 1973;[5] *United States* v. *Martin Linen Supply Co.,* 485 F.2d 1143 (C.A. 5), certiorari denied, No. 73–743, February 19, 1974; *United States* v. *Esposito,* C.A. 7, No. 72–1825, decided June 12, 1973, certiorari denied, No. 73–432, January 7, 1974; *United States* v. *Walker,* 489 F.2d 1353 (C.A. 7); *United States* v. *Brown,* 481 F.2d 1035 (C.A. 8). Cf. *United States* v. *Southern Railway Co.,* 485 F.2d 309 (C.A. 4); *United States* v. *Rothfelder,* 474 F.2d 606 (C.A. 6), certiorari denied, 413 U.S. 922.

B. THE DOUBLE JEOPARDY CLAUSE

Relying on cases such as *United States* v. *McCreery,* 473 F.2d 1381 (C.A. 7), petitioner argues that an

[4] The "explicit expression of this intent" was added "in view of the restrictive judicial interpretations of congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted" (S. Rep. No. 91–1296, *supra,* p. 18).

[5] In *United States* v. *Jenkins, supra,* Slip op. p. 700, Judge Friendly wrote:

"* * * Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set to rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91–1296, at 4–13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal * * *.

appeal is barred by the Double Jeopardy Clause because the order of dismissal is in effect the equivalent of a "judgment of acquittal." That approach, we submit, is erroneous.

The law is clear that jeopardy attaches so as to bar further prosecution only "when a jury has been selected and sworn." *Illinois* v. *Somerville,* 410 U.S. 458, 466; *United States* v. *Jorn,* 400 U.S. 470, 479–480; *Downum* v. *United States,* 372 U.S. 734; *Green* v. *United States,* 355 U.S. 184. Since the motion to dismiss in this case was made prior to the commencement of trial and before a jury had been selected, jeopardy had not attached, and further prosecution was not barred by the Double Jeopardy Clause.

The cases decided under provisions of the Criminal Appeals Act prior to the 1971 amendments are particularly apposite here. Section 3731, as it then read, authorized a direct appeal to this Court from a district court "decision or judgment sustaining a motion in bar, *when the defendant had not been put in jeopardy*" (18 U.S.C. (1964 ed.) 3731, emphasis added). The cases consistently held that appeals from pretrial orders dismissing indictments, which otherwise came within the technical definition of a motion in bar, were not barred by the "jeopardy" exception to Section 3731. See, *e.g., United States* v. *Celestine,* 215 U.S. 278, 283, holding that "[t]he defendant in this case had not been put upon trial, therefore he had not been put in jeopardy"; *United States* v. *Blue,* 384 U.S. 251, 253, holding that since the defendant "had not yet been brought to trial and put in jeopardy when dismissal occurred * * * our jurisdiction under the statute is secure * * *." Accord: *United*

States v. *Murdock*, 284 U.S. 141; *United States* v. *Halseth*, 342 U.S. 277; *United States* v. *Covington*, 395 U.S. 57, 59, n. 2. Cf. *United States* v. *Brewster*, *supra*, 408 U.S. at 506.

The effect of these decisions cannot be avoided simply by attaching the label of an "acquittal" to the pretrial dismissal of the indictment, as was done in *United States* v. *McCreery*, *supra*, 473 F. 2d at 1382. The Double Jeopardy Clause protects a defendant from being "twice put in jeopardy" for the same offense and not from appeal after an "acquittal." Here, the district court dismissed the indictment before trial and before jeopardy attached.[6] The mere fact that the district judge, in deciding the pretrial motion, considered facts that could also be considered during a trial on the merits does not convert the hearing and determination of a pretrial motion into a trial subjecting the defendant to jeopardy.[7] The

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[6] In *United States* v. *Wilson*, C.A. 3, No. 73-1444, decided January 15, 1974, the court of appeals held that a judgment of dimissal, entered after a verdict of guilty, on the ground of preindictment delay, was an "acquittal". It further held that an appeal was barred by the Double Jeopardy Clause even though the only relief sought on appeal was not a retrial, but an order directing the entry of a judgment of conviction. In its opinion below, the court of appeals distinguished this case from its decision in *Wilson* on the ground that the order of dismissal here was entered before jeopardy had attached (App., *infra*, p. 19, n. 1).

The petition for certiorari filed by the United States in the *Wilson* case (No. 73-1395) raises the issue, which is related to that in the instant case, whether an appeal from a post-conviction dismissal is barred by the Double Jeopardy Clause.

[7] This conclusion is especially evident where, as in the present case, neither the defendant nor the government waived the right to a trial of the merits before a jury. See Rule 23(a), Fed. R. Crim. P.; *Singer* v. *United States*, 380 U.S. 24.

crucial distinction between such a pretrial proceeding and a trial before a jury (or a judge, where a jury has been waived) is that the district court, ruling on a pretrial motion to dismiss, has no power to enter a guilty verdict. Accordingly, a defendant is never in jeopardy of conviction during this stage of the case.

Although we believe it is evident that the Double Jeopardy Clause does not bar an appeal in these circumstances, there is a clear conflict among the courts of appeals. The order of the district court here would *not* be appealable under the holdings of the courts of appeals for the Fourth, Sixth and Seventh Circuits. *United States* v. *King*, 474 F. 2d 1343 (C.A. 4), certiorari denied, 413 U.S. 922; *United States* v. *Southern Railway Co.*, 485 F. 2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F. 2d 606 (C.A. 6), certiorari denied, 413 U.S. 922; *United States* v. *McCreery*, 473 F. 2d 1381 (C.A. 7); *United States* v. *Ponto*, 454 F. 2d 657 (C.A. 7, *en banc*). It *would* be appealable under the holdings of the courts of appeals for the Second, Fifth, and Eighth Circuits. *United States* v. *Velazquez*, 490 F. 2d 29 (C.A. 2)[8]; *United*

[8] Although an order of dismissal of the kind entered here would be appealable under the holding of Court of Appeals for the Second Circuit in *Velazquez*, that case held other pretrial dismissal orders, which have been held to be appealable by other courts of appeals, not to be appealable. For example, contrary to the decisions in *United States* v. *Walker*, 489 F. 2d 1353 (C.A. 7), and *United States* v. *Pecora*, 484 F. 2d 1289 (C.A. 3), the Second Circuit in *Velazquez* stated that a pretrial order dismissing an indictment on the basis of a stipulated set of facts would not be appealable. (490 F. 2d at 34).

States v. *Martin Linen Supply Co.*, 485 F. 2d 1143 (C.A. 5), certiorari denied, No. 73–743, February 19, 1974; *United States* v. *Brown*, 481 F. 2d 1035, 1041 (C.A. 8).

CONCLUSION

The petition for certiorari should be granted to resolve this conflict,[9] which affects not only selective service cases, but all cases in which the district court finds it convenient to dispose of affirmative defenses prior to trial.[10] "Otherwise the courts and the parties must [continue to] expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States* v. *Sisson*, 399 U.S. 267, 307.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[9] Since last June, where our petitions for writs of certiorari in *United States* v. *Rothfelder*, *supra*, and *United States* v. *King*, *supra*, were denied, the conflict among the courts of appeals, which we suggested was then emerging, has fully blossomed.

[10] See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, *supra*, (pretrial dismissal of criminal contempt petition in an anti-trust case); *United States* v. *Southern Railway Co.*, *supra*, (pretrial dismissal of information charging violation of Elkins Act); *United States* v. *Pecora*, *supra*, (pretrial dismissal of indictment charging violation of Labor-Management Relations Act); *United States* v. *Hill*, 473 F. 2d 759 (C.A. 9) (pretrial dismissal of indictment in an obscenity case).

APPENDIX

United States Court of Appeals for the Third Circuit

No. 73-1736

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID EMERY SERFASS

(D.C. Criminal No. 15229)

Appeal From the United States District Court
for the Middle District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
December 19, 1973

Before VAN DUSEN, ALDISERT and ROSENN, Circuit Judges

JAMES W. WALKER, ESQUIRE
for appellant.

HARRY A. DOWER, ESQUIRE
BOYD G. HIXSON, ESQUIRE
DOWER, MACKSON, HAUFF & HETTINGER
for appellee.

OPINION OF THE COURT

(Filed February 20, 1974)

ROSEN, Circuit Judge

This appeal is hopefully one of the last of a long series of selective service cases involving the issue of whether an order to report for induction was invalid for failure of the local board to reopen the registrant's classification pursuant to a post-induction order request for conscientious objector status. Since the district court of the Middle District of Pennsylvania dismissed the indictment, the defendant also raises on appeal the issue of double jeopardy. Because we find the order of dismissal is appealable, and the dismissal was improper in light of the subsequent decision in *Musser* v. *United States*, 42 U.S.L.W. 3286 (U.S. November 13, 1973), we reverse.

The facts of this case are not in dispute. On November 16, 1970, Serfass was ordered by his local board to report for induction on December 1. He appeared on December 1 and requested a delay in his induction in order that he could submit additional medical evidence. The delay was granted, but on December 18 he was again ordered to report for induction, this time on January 18, 1971. On December 29, he visited his local board and requested the form for conscientious objector application, SSS–150. His form 150 was returned to the local board on January 8, and on January 13 he received a courtesy interview as he had requested. By letter dated January 14, the board notified him that it had considered his entire file and "unanimously agreed that there was no change over which you had no control and decided not to re-open your file." The board also informed him that he was still obligated to report for induction on January 18. No other reasons for the refusal to reopen his file were given. On January 18, Serfass appeared at the examining station and refused induction. This prosecution followed under 50 App. U.S.C. § 462.

Before trial, Serfass moved for dismissal of the indictment on the ground that the local board had denied him due process by inadequately setting forth its reasons for denying his request to reopen his classification and to grant him conscientious objector status. The district court granted this motion, relying on defendant's selective service file, his affidavit in support of his motion which set forth that he had applied for conscientious objector status and had received from his local board only the January 14 letter denying his claim, and a stipulation of counsel that the information he sent to the board set forth a prima facie conscientious objector claim based upon late crystallization of beliefs.

On the basis of the law prevailing in this Circuit at that time, the district court stated in its opinion:

> The enumerated facts indicate clearly that Serfass is entitled to full consideration of his claim prior to assignment to combatant training and service. *Ehlert* v. *United States,* 1971, 402 U.S. 99, 103–04 & n. 7, 107. Therefore, since the statement of reasons given for refusing to reopen is sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing his right to in-service review, defendant's motion to dismiss the indictment will be granted. [Footnotes omitted.]

The footnotes indicate that the court relied primarily upon *United States* v. *Ziskowski,* 465 F. 2d 480 (3d Cir. 1972), and *United States* v. *Folino,* No. 72–1974 (3d Cir. June 29, 1973).

I

We first consider defendant's contention that we have no jurisdiction to hear this Government appeal from the district court's dismissal of the indictment. Resolution of this contention turns upon our construction of the Criminal Appeals Act, 18 U.S.C. § 3731, which reads:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

This version of the Act is applicable to all actions begun in any district court after January 2, 1971, (84 Stat. 1890, 1893) and therefore applies to the present action.

Actions brought prior to January 2, 1971, were governed by an earlier version of the Criminal Appeals Act, the relevant portion of which made a criminal case appealable by the United States to the court of appeals:

> [f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, except where a direct appeal to the Supreme Court is provided by this section.

See United States v. *Pack,* 247 F. 2d 168 (3d Cir. 1957).

Under this former version of the Act it is clear that no appeal by the United States would lie in the instant case. Appeals were permissible only if the dismissal of an indictment was based upon a defect in the indictment or in the institution of the prosecution, rather than upon evidentiary facts outside the face of the indictment which would possibly constitute a defense at trial. *See, e.g., United States* v. *Ponto,* 454 F. 2d 657, 663 (7th Cir. 1971) (en banc);

United States v. *Findley*, 439 F. 2d 970 (1st Cir. 1971).

The 1971 amendment to § 3731, however, was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible. Cases decided under the prior version of § 3731 are of little aid in determining appealability under the present version. *See United States* v. *Pecora*, 484 F. 2d 1289 (3d Cir. 1973).

In *Pecora*, we held appealable under the present version of § 3731 the district court's pretrial dismissal of an indictment based upon a stipulation of the facts upon which the indictment was returned.

In discussing the appealability of the pretrial dismissal, we indicated that absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn. We held that entering into the stipulation of facts "for the purpose only of attacking the validity of the indictment did not constitute the waiver necessary under Rule 23(a)." Therefore, we concluded, since jeopardy had not attached at the time of the pretrial dismissal of the indictment, the Government could appeal the dismissal. *United States* v. *Pecora*, 484 F. 2d at 1292–93. We also rejected as inconsistent with § 3731 the contention that our holding would discourage defense counsel from expediting procedure by making pretrial motions for dismissal, and instead encourage counsel to wait until the jury was sworn before making motions for dismissal. 484 F. 2d at 1289. *See* Fed. R. Crim. Proc. 12(b).

We believe the instant appeal is squarely controlled by *United States* v. *Pecora, supra*. As in *Pecora*, the

pretrial motion of dismissal was based upon undisputed facts raising a legal issue and the defendant did not waive his right to a jury trial.[1]

Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding, as in *Pecora,* that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismis-

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[1] The district court in this case expressly found that the defendant did not waive his right to a jury trial. Not only were none of the procedures required by Rule 23(a) complied with, but attached to the motion to dismiss the indictment was a motion to postpone the trial until after the disposition of the motion on the merits. *Cf. United States* v. *Wilson,* 73–1444 (3d Cir., filed January 15, 1974) (opinion sur denial of panel rehearing) (*post-trial* directed verdict of acquittal).

Pecora distinguished *United States* v. *Hill,* 473 F. 2d 759 (9th Cir. 1972), which held unappealable the district court's pretrial dismissal of an indictment alleging the mailing of obscene advertisements. The dismissal was on the ground that the stipulated materials were not legally obscene. *Hill* was distinguished on two grounds. First, the Court of Appeals in *Hill* did not determine whether the defendant had waived his right to a jury trial. Second, in *Hill* "evidence was actually entered into the record. The district court determined the character of that evidence so it may be said that jeopardy had attached." We do not consider this second distinction between *Pecora* and *Hill* to permit our holding the instant order unappealable. To the extent that *Pecora* and *Hill* may be inconsistent, we are of course bound by *Pecora.*

sal of the indictment in the instant case was an appealable order.[2]

II

Our consideration of the merits of the Government's appeal requires a cursory review of the line of cases in this circuit upon which the district court's dismissal of the indictment was based. At all pertinent times, the post-induction order reopening of a registrant's selective service classification by his local board was governed by Regulation 1625.2, 32 CFR § 1625.2, which provided that,

> [T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board *first specifically finds* there has been *a change in the registrant's status resulting from circumstances over which the registrant had no control.*[3] [Emphasis supplied.]

In *Ehlert* v. *United States*, 402 U.S. 99 (1971), a registrant who had submitted a post-induction order

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[2] *Accord: United States* v. *Martin Linen Supply*, 485 F. 2d 1143 (5th Cir. 1973); *United States* v. *Brown*, 481 F.2d 1035 (8th Cir. 1973).

Contra: United States v. *Southern Railway Company*, 485 F.2d 309 (4th Cir. 1973); *United States* v. *Rothfelder*, 474 F.2d 606 (6th Cir.), *cert. denied*, 413 U.S. 922 (1973); *United States* v. *McCreery*, 473 F.2d 1381 (7th Cir. 1973).

See also: United States v. *Hill*, 473 F.2d 759 (9th Cir. 1972), distinguished by this court in *Pecora*. See note 1 *supra*.

[3] Regulation 1625.2, 32 CFR § 1625.2 in pertinent part provided:

"The local board may reopen and consider anew the classification of a registrant * * * upon the written request of the registrant * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; * * * provided, * * * the classification of a registrant shall not be reopened after the local board

(Continued)

conscientious objector claim refused induction after being notified by his local board that,

> [I]t had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening.

402 U.S. at 100. The Supreme Court affirmed the ensuing conviction, rejecting the registrant's claim that crystallization of conscientious objection is a circumstance over which he had no control. While agreeing that the language of the regulation was "not free from doubt," the Court regarded as controlling the Government's "plausible" and "consistently urged" interpretation that the regulation only applied to "objectively identifiable" and "extraneous" circumstances, 402 U.S. at 104, and that reopening was not required for a change in beliefs.

Furthermore the Court held this interpretation to be a valid timeliness rule, since the military already had procedures for handling in-service conscientious objector claims, and post-induction order claims could legitimately be decided by the military forum as long as claimants were not subject to combatant training or service until their claims had been acted upon.

The Court held, however, that "a 'no man's land' would be intolerable," 402 U.S. at 104 n. 7, and a conscientious objector claimant must be given some opportunity to have his claim heard on the merits,

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(Continued)

has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

either by his local board or by the military, whenever the change in his beliefs occurred. The Court therefore felt obligated to look at existing military procedures to determine whether the requirement that all claimants receive some forum to present their claims was met in practice. Although recognizing that the "somewhat inconsistent" military regulations "contained formulations seeming to look the other way," 402 U.S. at 106,[4] the Court relied upon a letter written by the General Counsel of the Army which stated that present practice, as well as practice when the registrant had been ordered to report for induction, permitted presentation to the military of such post-induction order conscientious objector claims, and that there was no possibility that late crystallizers would find themselves without a forum in which to present their claims. The Court accepted this statement, warning that if a situation should arise "in which neither the local board nor the military had made a full opportunity to present a prima facie conscientious objector claim for determination under established criteria, * * * a wholly different case would be presented." 402 U.S. at 107. The Court concluded by stating that,

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[4] The Court cited Army Regulation No. 635-20, ¶ 3:

"a. Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the military service.

"b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim * * * Requests for discharge after entering military service will not be favorably considered when—

"(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment."

> [W]e hold that the Court of Appeals did not misconstrue the Selective Service regulation in holding that it barred presentation to the local board of a claim that allegedly arose between mailing of a notice of induction and the scheduled induction date.

402 U.S. at 107–108.

United States v. *Shomock,* 462 F. 2d 338 (3d Cir. 1972), raised the question of whether *Ehlert* had overruled our decision in *Scott* v. *Commanding Officer,* 431 F. 2d 1132 (3d Cir. 1970), and this court answered in the negative. The registrant had filed a post-induction order conscientious objector claim and had refused induction after being informed by the local board that the information he had submitted did not warrant reopening of his classification.

This court reversed the ensuing judgment of conviction. First, we held, under *Scott* the local board was obliged to inform the registrant of the basis for its denial of his claim, whether it was for "lack of jurisdiction or some other technical reason or was a decision based on the merits of Shomock's claim." 462 F. 2d at 346. Furthermore, we held, *Ehlert* did not compel a different result because in the case at hand there was doubt that the registrant would in fact have received a full and fair hearing by the military of his conscientious objector claim. First, this court feared that the military might rely on AR 635–20 ¶ 3(b)(2),[5] not cited in *Ehlert,* to deny the registrant

[5] AR 635–20, ¶3(b) provides:

"* * * Requests for discharge after entering military service will not be favorably considered when—

* * * * *

"(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction."

This provision is quoted in *United States* v. *Ziskowski,* 475 F. 2d 480, 485 (3d Cir. 1972).

an in-service hearing on the merits of his claim on the ground that his claim had already been denied by the local board prior to induction.

Second, we noted that AR 635–20 ¶ 3(b)(1) at the time the registrant had refused induction and until August 15, 1970, precluded on its face in-service review of conscientious objector claims which arose before induction, even if the claim arose after the registrant had received his induction notice.[6] This court therefore did not consider persuasive a letter addressed to it by the General Counsel of the Department of the Army which apparently relied upon the *amended* version of ¶ 3(b)(1), cited in *Ehlert*. The letter stated that Army practice was to permit in-service review of post-induction order conscientious objector claims which had been denied by a local board solely because of late crystallization of beliefs.[7]

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[6] The provision had read as follows:

"* * * Requests for discharge after entering military service will not be favorably considered when—

"(1) Based solely on conscientious objection which existed but was not claimed *prior to induction*, enlistment, or entry on active duty for training." [Emphasis supplied.]

On August 15, 1970, the emphasized language was amended to read "prior to notice of induction." The amended version was quoted *Ehlert*. *See* note 4 *supra*.

[7] The relevant portions of the letter asserted the following:

"If the appellant had entered the Army in May 1969 under circumstances where the Selective System actually considered and denied his conscientious objector claim on the merits, he would not have been entitled to an in-service determination on the merits of his conscientious objector claim.

"If the appellant had entered the Army in May 1969 under circumstances where his local draft board merely refused to reopen his classification because his asserted views crystallized subsequent to the receipt of his induction notice, in the view of the Department of the Army personnel responsible for administering the conscientious objector claims of in-service

For both of these reasons, the military might have refused to consider the registrant's claim on the merits, even though the local board might have rejected his claim by relying solely upon *Ehlert* without reaching the merits of his claim. There was a strong possibility, therefore, that the registrant had been placed in the "no man's land" condemned by *Ehlert,* with no opportunity to have his post-induction order conscientious objector claim considered on the merits. His induction order was therefore held invalid.

The same issue was presented in *United States* v. *Ziskowski,* 465 F. 2d 480 (3d Cir. 1972). The registrant had filed a post-induction order conscientious objector claim, and in response had received, following an interview, a letter stating that,

> It is the determination of the board that there has been no change in your status resulting from circumstances over which you had no control. Your classification has not been reopened.

465 F. 2d at 481. On the authority of *Scott, supra,* this court reversed the ensuing conviction for refusing induction. We distinguished *Ehlert* by noting that the local board in that case had indicated that its refusal to reopen the registrant's classification was based on its finding that crystallization of conscientious objector beliefs was not a circumstance over which the registrant had no control. In the case before the court, however, it was not clear whether the denial was for this reason or for any one of several other reasons. *See* 465 F. 2d at 482–483.

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members, he would have been entitled under Army policy to an in-service determination on the merits of his conscientious objector claim."

462 F. 2d at 345 n. 17.

Moreover, this court found "substantial support" for this result from *Ehlert* itself. Relying on AR 635–20 ¶3(b)(2),[8] not cited in *Ehlert,* the court reasoned that even if the military interpreted that regulation to bar only in-service review of claims which had been denied *on the merits* by a local board,[9] the military might reasonably have construed the Board's action as to Ziskowski as having been a determination on the merits precluding in-service review. Therefore Ziskowski would have been in the "no man's land" which had been disapproved by *Ehlert.* The local board might have denied his claim for procedural reasons, while the military, interpreting the local board's denial as having been on the merits, might have then refused to consider his claim.

In *United States* v. *Folino,* No. 72–1974 (3d Cir., June 29, 1973), this court reversed a selective service conviction on the authority of *Ziskowski.*

The Supreme Court appears to have placed an abrupt end to this line of cases, however, by its recent per curiam decision in *Musser* v. *United States,* 42 U.S.L.W. 3286 (U.S. November 13, 1973). That case involved the consolidated appeal by two selective service registrants who had been convicted for refusing induction after having their post-induction order conscientious objector claims rejected by their local boards. One registrant had received a letter from his board stating that the board "did not specifically find there has been a change in status resulting from circumstances over which you had no control." The other registrant had received a letter stating simply that the board "found no ground for reopening your classification."

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[8] *See* note 5 *supra.*

[9] As noted in *Ziskowski,* this interpretation was later adopted explicitly. 465 F.2d at 485 n.12.

Petitioners relied upon *Ziskowski, Shomock,* and *United States* v. *Alioto,* 469 F. 2d 722 (1st Cir. 1972), a similar case. The Supreme Court flatly rejected the reasoning of these cases. In answering the argument that the military might consider the local board's refusal to reopen to have been on the merits when it was in fact procedural, the Court stated that *Ehlert* had held that a local board was "without power" to rule on the merits of a post-induction order conscientious objector claim, and

> [f]rom this it follows that in no event can a mere refusal to reopen signify more than a recognition of lack of power to do so; it cannot and does not bear any significance as to the merits of a registrant's claim.
>
> * * * * *
>
> [N]o matter what the board's apparent motivations in refusing to reopen the petitioner's classification may have been, the boards were simply without power to reopen, and an expressed or unexpressed indication of the board's views of the claims cannot be deemed a denial of those claims on the merits.

As in *Ehlert,* the Court then turned "to a consideration of whether 'the conditions for the validity of such a rule * * * are met in practice.'" The Court noted AR 635–20, ¶3(b)(2), which seemed to bar in-service review of a claim which had been "claimed and denied" before induction.[10] The Court stated that,

> While the critical word "denied" might arguably be applied to a board's refusal to reopen a classification, it cannot be so applied to a refusal to reopen a classification based on a claim of conscientious objection crystallizing after issuance of a notice to report, now that Ehlert had made clear that such a refusal can only

[10] *See* note 5 *supra.*

> be based on the board's lack of power to reopen in such a posture.

The Court also relied upon the letter written by the General Counsel of the Department of the Army which we had considered in *Shomock*,[11] and which stated that when a refusal to reopen by a local board is not based on the merits, the registrant could receive a full in-service hearing on the merits. The Court concluded that,

> In the event that a local board in one way or another manifests its views as to the sincerity of late-crystallizing registrants' claims, such expressions must be given no effect by the armed forces in reviewing an in-service conscientious objection request.

Mr. Justice Douglas, in dissent pointed out that "[t]he opinions summarily affirmed today conflict squarely, as the Solicitor General concedes, with decisions in the First, Second, and Third Circuits." Included in the list of cases that follows this statement are *Shomock, Ziskowski,* and *Folino.* We agree that these three cases are inconsistent with *Musser* and for that reason are no longer the law.

Musser was decided after the district court dismissed the indictment in this case, and of course long after Serfass himself refused induction. We must therefore decide whether *Musser* is to be applied retroactively to registrants who refused induction before the case was decided.

We have no hesitation in answering this question in the affirmative. *Musser* did not announce any new principle of law. Rather, the case, by relying on indications of military policy which were already before us in *Shomock* and *Ziskowski,* held that our interpretation of military policy in those cases was incorrect;

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[11] *See* note 7 *supra.*

there was no danger that the registrants whose convictions we had reversed would have found themselves in a "no man's land."

Furthermore, the two registrants whose convictions were affirmed in *Musser* had refused induction in February 1969 and January 1971, respectively. Serfass, as noted, refused induction in January 1971. *Musser* appears to hold, therefore, that even at the time Serfass refused induction, he would have been permitted by military policy to obtain an in-service review of his conscientious objector claim. He therefore cannot justify his refusal of induction on the ground that he faced the "no man's land" of *Ehlert*, even though his local board did not explain why it had denied his conscientious objector request.[12]

The order of the district court granting the motion to dismiss the indictment will be reversed. The case will be remanded to that court for trial or other proceedings consistent with this opinion.

A True Copy:
Teste:
Clerk of the United States Court of Appeals for the Third Circuit.

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[12] *Ehlert* was decided on April 21, 1971. Serfass refused induction after *Scott* but before *Ehlert*. The Court in *Musser* implicitly held *Ehlert* retroactive, however, since it interpreted *Ehlert* as requiring the affirmance of two convictions for refusing induction, even though both acts had taken place before *Ehlert* was decided.

We note that since neither conviction affirmed by the Court in *Musser* involved a refusal of induction in a circuit in which the prevailing case law was at the time clearly contrary to *Ehlert*, the Court did not necessarily decide whether actual good faith reliance on pre-Ehlert case law might negate the element of willfulness necessary to sustain a conviction. *See, e.g., United States* v. *Mercado*, 478 F. 2d 1108 (2d Cir. 1973).

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